

Fuel Industry Amendment Bill

Government Bill

As reported from the Economic Development, Science and Innovation
Committee

Commentary

Recommendation

The Economic Development, Science and Innovation Committee has examined the Fuel Industry Amendment Bill. We were unable to agree whether the bill should pass. We recommend amendments to the bill, set out in this report, should it be determined by the House that the bill be passed.

Introduction

This bill would amend the Fuel Industry Act 2020. The Act implemented some of the recommendations that the Commerce Commission made in its retail engine fuel market study in 2019.¹ The Act introduced a terminal gate price (TGP) regime for the wholesale fuel market. The TGP regime requires wholesale fuel suppliers at a storage terminal to publicly post a price (the TGP) at which they would sell a specified engine fuel to wholesale customers on a “spot” basis.²

This bill would create a regulatory backstop for the TGP regime. This would include empowering the Commerce Commission to recommend price regulation of TGPs. The Commission would only be able to make a recommendation if satisfied that particular TGPs are not consistent with prices that would be expected in a workably competitive market. Price regulation could be implemented for TGPs with reference to specific fuel types, bulk storage facilities, or wholesale suppliers.

¹ You can read the Commerce Commission’s market study here.

² A “spot” price is the price that a commodity is currently trading for in the marketplace.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Power to recommend price regulation of TGPs

The bill would allow the Commerce Commission to recommend price regulation of TGPs when TGPs are not consistent with what would be expected in a competitive market. We think that the bill should instead specify that the Commission may only make such a recommendation when the TGPs are higher than prices that would be expected in a competitive market. Therefore, we recommend amending clause 4, proposed new section 29C of the bill, to change “not consistent with” to “above”. We consider that using “above” would make it clearer when the Commission may make a recommendation. This is because TGPs that are not consistent with what would be expected in a competitive market are TGPs that are above what would be expected in a competitive market.

Timeframes for inquiries into TGPs

The bill would allow the Commerce Commission to conduct inquiries into TGPs. The Commission could decide to open an inquiry or it could be directed to do so by the Minister.³ After the Commission conducts an inquiry, it would be required to recommend to the Minister whether those TGPs should be price regulated. The bill would require the Minister to set a deadline for the Commission to make a recommendation when they direct the Commission to open an inquiry. However, there would not be a deadline for the Commission to make a recommendation when it decides to conduct an inquiry.

To give stakeholders certainty, we recommend that the bill require the Minister to set a deadline for the Commission to make its recommendation after any self-initiated inquiries. Our recommended amendment to proposed new section 29D would mean that all inquiries into TGPs conducted by the Commission would have a deadline for making a recommendation.

TGP regulation period

The bill as introduced would allow the Governor-General, on the Minister's recommendation, to impose price regulation on one or more TGPs by Order in Council. The Order in Council would be required to include an expiry date that is no more than 10

³ Minister is defined in section 4 of the Act.

years after it is made. We think that 10 years is a long time for price regulation to be imposed in the fuel market. However, we also believe that TGP price regulation with a maximum period of less than 5 years is unlikely to have significant benefits for consumers compared to the time and cost of implementation.

Therefore, we recommend amending proposed new section 29J to set the maximum period for TGP price regulation at 5 years. We think that a period of 5 years would give wholesale suppliers certainty and ensure that consumers benefit from the price regulation.

Consideration of investment incentives before making determinations

Upon the Governor-General making an Order in Council, the Commerce Commission must make determinations that would regulate TGPs. We heard that the bill should be more specific about what the Commission would need to consider before making a determination. We note that any determination by the Commission to regulate TGPs would need to be consistent with the purpose of the Fuel Industry Act.⁴

In considering whether the Act's purpose is promoted in making a determination, the Commission must take into account the outcomes that would be expected in a competitive market. These outcomes include wholesale suppliers' incentives to invest to meet the demand of end users of engine fuel products. Consequently, we recommend amending proposed section 29L.

Collecting information for an inquiry and making a determination

Section 98 of the Commerce Act 1986 enables the Commission to require persons and body corporates to provide documents and information. The Commission may do so when it considers it necessary or desirable in order to fulfil its functions and powers under that Act. Section 98 of the Commerce Act 1986 is already incorporated into the Fuel Industry Act 2020 for the purposes of proceedings and enforcement.

Proposed section 29O of the bill would incorporate certain aspects of the Commerce Act. This would include allowing the Commission to collect information from wholesale suppliers for inquiry and price regulation setting purposes. However, the Commission would not be able to collect information from wholesale suppliers who are not subjects of an inquiry. This would mean that the Commission would be limited in the information it could collect, even when that information may be relevant or useful for an inquiry.

We consider that the Commission should be able to collect information from wholesale suppliers, even when they are not subjects of a particular inquiry. This would

⁴ The purpose of the Act is to promote competition in engine fuel markets for the long-term benefit of end users of engine fuel products.

assist the Commission in conducting inquiries and effectively price regulating TGPs. We recommend amending proposed new section 29O to insert section 29O(1)(d).

Consultation should be more specific before making a determination

The bill would require the Commission to consult interested parties before making a determination to regulate TGPs. However, the bill is not clear about what detail must be consulted on. Therefore, we recommend amending proposed section 29L(2)(a) to require the Commission to consult interested parties on a pricing principle or methodology specifically.

New Zealand National Party view

There was bipartisan support for terminal gate pricing, which has aided new entrants such as NPD and Waitomo to enter the market. Competitive discount schemes have also been rolled out for consumers from most retailers. However, allowing the Commerce Commission to regulate and control the market and prices, as this bill will implement, is unnecessary and an overreach.

The methodology that the Commission will use to set prices is not clear. Investigations into fuel prices are left to the Commerce Commission's discretion, without suitable checks and balances in place. New Zealand has long been known for its low sovereign risk, and that is being put at risk by this bill. This legislation signals that the New Zealand Government is willing to intervene at any time in markets, which will have a chilling effect on overseas investment.

Appendix

Committee process

The Fuel Industry Amendment Bill was referred to the committee on 22 November 2022.

We called for submissions on the bill with a closing date of 23 January 2023. We received and considered submissions from six interested groups and individuals. We heard oral evidence from two submitters.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting. The Regulations Review Committee reported to us on the powers in clause 29.

Committee membership

Naisi Chen (Chairperson)

Jamie Strange (Chairperson and member until 8 February 2023)

Glen Bennett

Barbara Kuriger (until 8 February 2023)

Melissa Lee

Stuart Smith (from 8 February 2023)

Hon Michael Woodhouse (from 14 February 2023)

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Dr Megan Woods

Fuel Industry Amendment Bill

Government Bill

Contents

| | | Page |
|---|---------------|------|
| 1 | Title | 2 |
| 2 | Commencement | 2 |
| 3 | Principal Act | 2 |

Part 1

Amendment to principal Act to enable price regulation of terminal gate prices

| | | |
|---|----------------------|---|
| 4 | New Part 2A inserted | 2 |
|---|----------------------|---|

Part 2A

Price regulation of terminal gate prices

Subpart 1—Preliminary provisions

| | | |
|-----|--|---|
| 29A | Interpretation and overview | 3 |
| 29B | Effect of terminal gate prices being subject to price regulation | 3 |
| 29C | When terminal gate prices may be regulated | 4 |

Subpart 2—How price regulation may be imposed

Commission inquiry

| | | |
|-----|---|---|
| 29D | How inquiry triggered | 4 |
| 29E | Commission inquiry into particular terminal gate prices | 4 |
| 29F | Process of inquiry | 5 |
| 29G | Commission's recommendation following inquiry | 5 |

Order in Council imposing regulation

| | | |
|-----|--|---|
| 29H | Minister's consideration | 6 |
| 29I | Minister's decision and recommendation | 6 |

| | | |
|-----|--|---|
| 29J | Order in Council imposing regulation | 7 |
| 29K | Revocation or amendment of Order in Council | 7 |
| | <i>Commission determination about how regulation applies</i> | |
| 29L | Commission determination about how regulation applies | 8 |
| 29M | Amendment of determination made under section 29L | 9 |
| | Subpart 3—Miscellaneous provisions | |
| 29N | Commerce Act 1986 not limited | 9 |
| 29O | Application of Commerce Act 1986 to this Part | 9 |

Part 2

Other amendments to principal Act

| | | |
|----|--|----|
| 5 | Section 4 amended (Interpretation) | 10 |
| 6 | Section 9 amended (Obligation to post terminal gate price) | 10 |
| 7 | Section 30 amended (Pecuniary penalties) | 10 |
| 8 | Section 33 amended (Application of Commerce Act 1986) | 10 |
| 9 | Section 42 amended (Offences in respect of sections 98 and 98A of Commerce Act 1986) | 10 |
| 10 | Section 45 amended (Application of Commerce Act 1986) | 10 |
| 11 | Schedule 1 amended | 10 |

Schedule

New Part 2 inserted into Schedule 1

11

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Fuel Industry Amendment Act **2022**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

3 Principal Act

This Act amends the Fuel Industry Act 2020.

Part 1

Amendment to principal Act to enable price regulation of terminal gate prices 10

4 New Part 2A inserted

After Part 2, insert:

Part 2A

Price regulation of terminal gate prices

Subpart 1—Preliminary provisions

29A Interpretation and overview

- (1) In this Part, unless the context otherwise requires,— 5
price regulation or regulation means regulation under this Part
regulated terminal gate price means a terminal gate price that is declared to be regulated by an Order in Council under **section 29J**.
- (2) The process for imposing price regulation on particular terminal gate prices involves the following steps: 10
- (a) the Commission holds an inquiry into whether to regulate the terminal gate prices, and then makes a recommendation to the Minister under **section 29G**;
 - (b) the Minister considers the Commission’s recommendation and decides whether to recommend to the Governor-General that price regulation be imposed: 15
 - (c) if the Minister decides to recommend price regulation, an Order in Council may be made under **section 29J** that makes the terminal gate prices subject to that regulation:
 - (d) for each regulated terminal gate price (or group of regulated terminal gate prices), the Commission makes a determination under **section 29L** specifying the pricing principles or pricing methodologies that apply. 20
- (3) This section is intended only as a guide to the general scheme and effect of this Part. 25
 Compare: 1986 No 5 s 52E

29B Effect of terminal gate prices being subject to price regulation

- (1) If terminal gate prices are subject to price regulation, every wholesale supplier must comply with every determination made under **section 29L** applying to those prices and the supplier.
- (2) Sections 30 to 38 (which relate to civil proceedings relating to contraventions of this Part) apply to a wholesale supplier on and from the date on which the wholesale supplier is obliged to comply with a relevant determination made under **section 29L**. 30
- (3) The Commission is entitled to exercise any of its powers under this Act and under the Commerce Act 1986 (as applied by this Act) for the purpose of monitoring compliance with price regulation. 35

Compare: 1986 No 5 s 52F

29C When terminal gate prices may be regulated

The Commission may make a recommendation that price regulation should be imposed on terminal gate prices only if it is satisfied that the relevant wholesale supplier has posted terminal gate prices, for the relevant specified engine fuel and bulk storage facility, that were ~~not consistent with~~ above what would be expected in a competitive market.

5

Example

The Commission holds an inquiry into all terminal gate prices in New Zealand for diesel (in respect of all wholesale suppliers and all bulk storage facilities).

However, if only 1 supplier at 1 bulk storage facility has posted terminal gate prices for diesel that ~~are higher than were~~ above what would be expected in a competitive market, the Commission may recommend regulation only in respect of the diesel terminal gate prices of that supplier at that facility (and not other prices).

10

Compare: 1986 No 5 s 52G

Subpart 2—How price regulation may be imposed

15

*Commission inquiry***29D How inquiry triggered**

- (1) The Commission—
- (a) must hold an inquiry if required to do so by the Minister in writing; and
 - (b) may hold an inquiry on its own initiative.
- (2) ~~Any requirement by the Minister must—~~
- (a) ~~be in writing; and~~
 - (b) ~~specify the date by which the Commission must make a recommendation under **section 29G** to the Minister.~~
- (2) In both cases, the Minister must specify a time frame within which the Commission must make a recommendation under **section 29G** to the Minister.

20

25

Compare: 1986 No 5 s 52H

29E Commission inquiry into particular terminal gate prices

- (1) In conducting an inquiry into particular terminal gate prices, the Commission must consider—
- (a) whether the test in **section 29C** is met in relation to the terminal gate prices; and
 - (b) if so, whether price regulation should be imposed on the terminal gate prices and for how long; and
 - (c) if so, how the terminal gate prices should be defined (that is, by reference to all or any of specified engine fuel, wholesale supplier, or bulk storage facility).

30

35

- (2) During an inquiry, the Commission may have regard to any other matters it considers necessary or desirable for the purpose of the inquiry.

Compare: 1986 No 5 s 52I

29F Process of inquiry

- (1) At the start of an inquiry, the Commission must publish in the *Gazette* a notice setting out,— 5

- (a) in the case of an inquiry required by the Minister, the Minister’s requirements; and
- (b) in the case of an inquiry on the initiative of the Commission, the terms of reference for the inquiry. 10

- (2) The notice must set out indicative time frames and key steps.

- (3) Before making a recommendation under **section 29G**, the Commission must consult interested persons about the proposed recommendation (including the Commission’s reasons for proposing to make a recommendation).

Compare: 1986 No 5 s 52J; 2022 No 21 s 13 15

29G Commission’s recommendation following inquiry

- (1) At the end of an inquiry, having considered the matters in **section 29E**, the Commission must make a recommendation to the Minister on whether, in its opinion, price regulation should be imposed on all or any of the terminal gate prices that were the subject of the inquiry. 20

- (2) If the Commission recommends that price regulation should be imposed on particular terminal gate prices, the recommendation must state—

- (a) which terminal gate prices should be regulated, by reference to all or any of the following:
 - (i) the specified engine fuel or fuels: 25
 - (ii) the wholesale supplier or suppliers:
 - (iii) the bulk storage facility or facilities; and
- (b) how long the regulation should be in place.

- (3) The Commission must make the recommendation publicly available as soon as practicable after making it, including a statement of its reasons for making the recommendation. 30

- (4) To avoid doubt, a recommendation by the Commission is not a determination of the Commission.

Compare: 1986 No 5 s 52K

*Order in Council imposing regulation***29H Minister's consideration**

- (1) The Minister must consider any recommendation of the Commission made under **section 29G**.
- (2) As part of that consideration, the Minister— 5
- (a) must consult the Minister of Commerce and Consumer Affairs and the Minister of Transport; and
 - (b) may request further information or advice from the Commission; and
 - (c) may request that the Commission reconsider any matter (for example, an error, an oversight, or a competing policy interest). 10
- (3) The Minister must make publicly available any request made under **subsection (2)(c)**, and the Commission must make publicly available its advice given following that request.
- (4) If the Commission receives a request under **subsection (2)(c)**, it may, at its discretion,— 15
- (a) consult interested parties; or
 - (b) reopen its inquiry, in which case **section 29F** applies with all necessary modifications.

Compare: 1986 No 5 s 52L

29I Minister's decision and recommendation 20

- (1) Having considered the Commission's recommendation in accordance with **section 29H**, the Minister must—
- (a) decide whether, in the opinion of the Minister, price regulation should be imposed on all or any of the terminal gate prices recommended by the Commission; and 25
 - (b) make a recommendation to that effect, if so.
- (2) The Minister's decision may be—
- (a) the same as the Commission's recommendation under **section 29G**; or
 - (b) different from the Commission's recommendation under **section 29G** only to the extent that all or any of the terminal gate prices recommended by the Commission should be not regulated. 30

Example

After an inquiry, the Commission recommends that all diesel terminal gate prices that are posted by suppliers A and B should be regulated.

The Minister may recommend the same or the Minister may recommend that regulation should apply only to all or some of supplier A's diesel terminal gate prices and not supplier B's (or vice versa). The Minister cannot recommend that regula- 35

tion should apply to supplier C unless the Commission makes a separate recommendation to that effect.

- (3) If the Minister’s decision is different from the Commission’s recommendation, the Minister must set out the reasons for the decision and make the decision, with the reasons, publicly available. 5

Compare: 1986 No 5 s 52M

29J Order in Council imposing regulation

- (1) The Governor-General may, on the recommendation of the Minister made under **section 29I**, make an Order in Council imposing regulation on particular terminal gate prices. 10

- (2) The order must declare that the terminal gate prices are regulated under this Part.

- (3) The order may identify the terminal gate prices it relates to by reference to all or any of—

- (a) the specified engine fuel or fuels: 15
- (b) the wholesale supplier or suppliers:
- (c) the bulk storage facility or facilities.

- (4) The order must include an expiry date (which must be a date not later than ~~10~~ 5 years after its commencement date) at the close of which the order is revoked. 20

- (5) Despite **subsection (5)**, the order may be earlier revoked in the manner in which it was made.

- (6) An order under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Compare: 1986 No 5 s 52N 25

29K Revocation or amendment of Order in Council

- (1) An Order in Council made under **section 29J** in respect of particular terminal gate prices may not be revoked or significantly amended unless the Commission has held an inquiry into the terminal gate prices.

- (2) In **subsection (1)**, **significantly amended** means amended in a way that materially alters the terminal gate prices to which the price regulation applies, so that— 30

- (a) the terminal gate prices, or any of them, are no longer regulated; or
- (b) terminal gate prices that were not identified in the original order are now subject to regulation. 35

- (3) An Order in Council made under **section 29J** may be amended in any other material way only after the Commission has consulted with interested parties, but may be amended in a non-material way without prior consultation.

Compare: 1986 No 5 s 52O

Commission determination about how regulation applies

5

29L Commission determination about how regulation applies

- (1) The Commission must make determinations under this section specifying how price regulation applies to wholesale suppliers and regulated terminal gate prices.

(1A) In considering whether the Act's purpose is promoted in making a determination, the Commission must take into account the outcomes that would be expected in a competitive market, including wholesale suppliers' incentives to invest to meet the demand of end users of engine fuel products.

10

- (2) Determinations must be made—

(a) only after consultation with interested parties on the draft pricing principle or pricing methodology that the Commission proposes to apply; and

15

(b) as soon as practicable after the Order in Council under **section 29J** is made.

- (3) Determinations must—

20

(a) set out, for each regulated terminal gate price, the pricing principles or pricing methodologies that apply and the requirements that apply to each wholesale supplier; and

(b) set out any time frames that must be met or that apply.

- (4) It is not necessary for a single determination to address all matters relating to particular regulated terminal gate prices, or to a wholesale supplier of regulated terminal gate prices, and different parts of any determination may come into effect at different times.

25

- (5) A determination under this section may require a wholesale supplier to comply with the requirements set out in any other determination that has been made under this section in respect of regulated terminal gate prices of the same type.

30

- (6) The Commission must, as soon as practicable after making a determination under this section, give to each wholesale supplier to which the determination relates notice of the determination and where it is available.

- (7) Each wholesale supplier to which the determination relates must comply with the requirements imposed by the determination.

35

| | | |
|---|---|----|
| (8) | A determination under this section and an amendment to a determination are secondary legislation (<i>see</i> Part 3 of the Legislation Act 2019 for publication requirements). Compare: 1986 No 5 s 52P | |
| 29M | Amendment of determination made under section 29L | 5 |
| (1) | A determination made under section 29L may be amended in a material way only after the Commission has consulted with interested parties, but may be amended in a non-material way without prior consultation. | |
| (2) | However, the Commission is not required to conduct an inquiry before amending a determination. | 10 |
| (3) | As soon as practicable after making an amendment, the Commission must give to each wholesale supplier to which the determination relates notice of the amendment and where it is available. Compare: 1986 No 5 s 52Q | |
| Subpart 3—Miscellaneous provisions | | 15 |
| 29N | Commerce Act 1986 not limited This Part does not limit subpart 2 of Part 4 of the Commerce Act 1986, which allows for regulation to be imposed on particular goods or services. Compare: 1986 No 5 s 56N | |
| 29O | Application of Commerce Act 1986 to this Part | 20 |
| (1) | The following provisions of the Commerce Act 1986 apply to this Part with any necessary modifications (including the following modifications): | |
| (a) | section 26 (Commission to have regard to economic policies of Government): | |
| (b) | section 53N (monitoring compliance with price-quality paths) as if each reference to a price-quality path were a reference to regulation under this Part: | 25 |
| (c) | section 53ZD (powers of Commission under Part 4) as if section 53ZD(1)(b) referred to investigation as to the terminal gate prices that would be expected in a competitive market and how any pricing principles or pricing methodologies being considered by the Commission may be applied or have been applied: | 30 |
| (d) | <u>section 98 (Commission may require person to supply information or documents or give evidence).</u> | |
| (2) | This section does not limit the application of other provisions of the Commerce Act 1986. | 35 |

Part 2

Other amendments to principal Act

- 5 Section 4 amended (Interpretation)**
In section 4, insert in its appropriate alphabetical order:
competition means workable or effective competition 5
- 6 Section 9 amended (Obligation to post terminal gate price)**
After section 9(3), insert:
(4) Subsection (3) is subject to **Part 2A**, if that Part applies.
- 7 Section 30 amended (Pecuniary penalties)**
After section 30(1)(a)(iii), insert: 10
(iv) requirements imposed by a determination made under **section 29L** (which relates to **Part 2A** price regulation of terminal gate prices); or
- 8 Section 33 amended (Application of Commerce Act 1986)**
After section 33(h), insert: 15
(ha) sections 99B to 99P (assistance to overseas regulators), as if—
(i) references to an overseas regulator were references to an overseas body that has functions relating to the regulation of the fuel industry:
(ii) references in those sections to the Minister were references to the Minister responsible for the administration of this Act: 20
- 9 Section 42 amended (Offences in respect of sections 98 and 98A of Commerce Act 1986)**
(1) Replace the heading to section 42 with “**Offences in respect of provisions of Commerce Act 1986**”. 25
(2) In section 42(1)(a), replace “notice under section 98” with “notice under sections 53N, 53ZD, and 98”.
- 10 Section 45 amended (Application of Commerce Act 1986)**
After section 45(c), insert:
(ca) section 17 (assent to determination): 30
- 11 Schedule 1 amended**
In Schedule 1,—
(a) insert the **Part** set out in the **Schedule** of this Act as the last Part; and
(b) make all necessary consequential amendments.

Schedule

New Part 2 inserted into Schedule 1

s 11

| | |
|---|----|
| Part 2 | |
| Provisions relating to Fuel Industry Amendment Act 2022 | 5 |
| 4 Interpretation in this Part | |
| In this Part, pre-commencement price means a terminal gate price that was posted before the commencement of the Fuel Industry Amendment Act 2022 . | |
| 5 Application of new Part 2A to existing prices | |
| (1) The Commission must not consider whether a pre-commencement price has met the test in section 29C . | 10 |
| (2) However, the Commission may take into account a pre-commencement price when considering whether a post-commencement price has met that test. | |
| Example | |
| A supplier posts an equal number of terminal gate prices before and after commencement. The prices that the Commission assesses against the test in section 29C will be only the prices from after commencement (that is, half of them). However, in assessing those prices against the test, the Commission can base its assessment, at least in part, on data that pre-dates commencement. | 15 |

Legislative history

15 November 2022
22 November 2022

Introduction (Bill 188–1)
First reading and referral to Economic Development, Science
and Innovation Committee